

THE ORBIT ACT'S AUCTION EXEMPTION DOES NOT ENCOMPASS TERRESTRIAL LICENSES

ORBIT's Auction Exemption is Limited to Satellite Authorizations. Section 647 of the Open-Market Reorganization for the Betterment of International Telecommunications Act ("ORBIT") provides that "the Commission shall not have the authority to assign by competitive bidding *orbital locations or spectrum used for the provision of international or global satellite communications services.*" Legislative history relating to an identical provision in a precursor bill to ORBIT (there is no explanatory statement on ORBIT's auction prohibition) demonstrates that Congress enacted the legislation to prevent the proliferation of auctions for international satellite authorizations, a problem *unique to satellite services*. As the House Commerce Committee explained:

The Committee believes that auctions of spectrum or orbital locations could threaten the viability and availability of global and international satellite services because concurrent or successive spectrum auctions in the numerous countries . . . could place significant financial burdens on providers of such services."^{1/}

These concerns simply do not exist in the context of auctions for terrestrial licenses because a terrestrial allocation would apply (and auctioning would occur) solely within the United States.

The FCC Has Not Applied ORBIT's Auction Limitation to Terrestrial Authorizations. The FCC has correctly recognized that Congress did not intend for the ORBIT auction exemption to encompass non-satellite services, holding that when it "establishes a terrestrial service . . . the ORBIT Act is not a bar to auctioning licenses merely because the terrestrial service operates on the same frequencies a satellite service."^{2/} Notwithstanding the enactment of ORBIT, the FCC has continued to use auctions to award licenses for the terrestrial use of spectrum in the 24 GHz and 39 GHz bands, which are also allocated for satellite services. The FCC also intends to auction licenses for fixed and mobile terrestrial services in a band (3690-3700 MHz) in which fixed satellite service operates, and it expressly determined that "the assignment of licenses for terrestrial services by competitive bidding is not prohibited by the [ORBIT Act]."^{3/}

^{1/} H.R. REP. NO. 105-494, at 64-65 (1998). ORBIT does not even prohibit the use of auctions for satellite services if the services are solely domestic. In signing ORBIT into law, President Clinton stated his "understanding that section 647 does not limit the Federal Communications Commission from assigning, via competitive bidding, domestic satellite service licenses intended to cover only the United States." Statement by President William J. Clinton upon signing S. 376, 36 WEEKLY COMP. PRES. DOC. 78 (Mar. 17, 2000).

^{2/} *In the Matter of Amendment of Parts 2 and 2 of the Commission's Rule, First Report and Order and Further Notice of Proposed Rule Making*, 16 FCC Rcd 4096 ¶ 326 (2000).

^{3/} *Amendment of the Commission's Rule with Regard to the 3650-3700 MHz Gov't Transfer Band, First Report and Order and Second Notice of Proposed Rulemaking*, 15 FCC Rcd 20488 ¶ 20 n.64 (2000).